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In the Supreme Court of the United States

OCTOBER TERM, 1993

PUBLIC CITIZEN AND SIERRA CLUB, PETITIONERS

v.

UNITED STATES TRADE REPRESENTATIVE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether judicial review under the Administrative Procedure Act (APA) of claims asserting that the United States Trade Representative (USTR) must prepare an Environmental Impact Statement (EIS) on the North American Free Trade Agreement (NAFTA) pursuant to the National Environmental Policy Act (NEPA) prior to transmittal of the agreement to Congress has been rendered moot by congressional approval of NAFTA and its implementing legislation.

2. Whether the court of appeals correctly held that the President's responsibility for final action in concluding NAFTA and transmitting the agreement to Congress precludes APA review of claims that an EIS on NAFTA must be prepared prior to the President's conclusion and transmittal to Congress of the agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 5 F.3d 549. The opinion and order of the district court (Pet. App. 12a-32a) is reported at 822 F. Supp. 21.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1993. The petition for a writ of certiorari was filed on October 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a court of appeals decision requiring dismissal of their action for declaratory and injunctive relief under the Administrative Procedure Act (APA), 5 U.S.C. 702, 704, asserting claims under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). In that action, petitioners sought to compel the office of the United States Trade Representative (USTR) to prepare an environmental impact statement (EIS) for the North American Free Trade Agreement (NAFTA) prior to the President's conclusion of that agreement and his transmittal of the agreement to Congress for its consideration. President Bush signed NAFTA, and President Clinton concluded related agreements, during the course of the litigation below. Congress thereafter approved NAFTA and enacted legislation implementing the agreement during the pendency of the petition for a writ of certiorari.

1. NAFTA is an international agreement, subject to congressional approval and implementation through legislation, that creates a free-trade zone spanning the North American continent. The agreement is comprised of 22 chapters, numerous annexes, and an exhaustive tariff schedule that eliminate or reduce tariff and nontariff barriers to trade among the United States, Canada, and Mexico. Pet. App. 3a. NAFTA's terms include numerous provisions intended to enhance environmental protection throughout the three nations, including specific provisions affirming each country's right to maintain its own laws, regulations, and standards for the protection of human health and the environment.

The negotiation and conclusion of the agreement were marked by substantial and sustained presidential involvement, and direct presidential control over the agreement's conclusion and the timing and terms of its submission to Congress. President Bush personally initiated the process for developing NAFTA consultations with Mexico's President Salinas in 1990. Following later discussions with Canada's Prime Minister Mulroney, President Bush informed Congress of the proposed negotiations, which then began among the United States, Canada, and Mexico. See The Extension of Fast Track Procedures: Message from the President of the United States, H.R. Doc. No. 51, 102d Cong., 1st Sess. (1991) (reviewing origin of NAFTA). Those negotiations were marked by President Bush's frequent personal participation, and resulted in substantial agreement on a text that was published in September 1992. On September 18, 1992, President Bush notified Congress and the public of his intention to enter NAFTA. 57 Fed. Reg. 43,603 (1992); see 19 U.S.C. 2903(a)(1). Ninety days later, on December 17, 1992, President Bush, along with Mexico's President Salinas and Canada's Prime Minister Mulroney, signed the agreement. See C.A. App. 59 (declarations of NAFTA negotiator).

Upon his inauguration, President Clinton announced that he would transmit NAFTA to Congress only if the three countries could reach satisfactory side agreements on environment, labor, and import surges. Pet. App. 6a. The President initiated further negotiations on those topics and concluded additional agreements in late August, 1993. NAFTA and its implementing legislation were transmitted to Con-

gress on November 3, 1993, and approved on November 20, 1993.

2. NAFTA was negotiated, concluded, and submitted to Congress according to the terms of the Trade Act of 1974 and subsequent amendments, including the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified at 19 U.S.C. 2101-2191, 2901-2906) (the Trade Acts). In the Trade Acts, Congress established the office of USTR, located "within the Executive Office of the President," 19 U.S.C. 2171, as the President's chief negotiator for trade matters. USTR is a successor to the Office of the Special Representative for Trade Negotiations that President Kennedy created by executive order in 1963. See Exec. Order No. 11,075, 3 C.F.R. 103 (1963). In recognition of USTR's proximity to the President, the Trade Acts are replete with provisions in which Congress recognized that USTR's role is directly tied to the President's role in the conduct of international trade negotiations. 19 U.S.C. 2171(c)(1); see 19 U.S.C. 2171(c)(1)(E), 2902, 2903; see also 15 C.F.R. 2001.3(a)(1)-(17) (USTR "performs the functions of the President").

Further provisions of the Trade Acts recognize the primacy of the President in international negotiations and in the domestic processes of setting policies for trade negotiations and seeking congressional approval of any agreements that result. For example, the Trade Acts provide that Congress will give "fast-track" consideration under its rules to certain trade agreements and implementing bills submitted by the President. Those rules strengthen the President's hand in negotiations with foreign nations by providing that if the President adheres to specified notice

and consultation requirements, then Congress is obligated to take a timely vote on the agreement as transmitted by the President, without delay or amendment.

Under fast-track rules, as elsewhere in the Trade Acts, the President takes the operative steps in the process. The President has the option of invoking fast-track rules if "the President shall consult" with Congress prior to negotiations, *e.g.*, 19 U.S.C. 2902(c), and if "the President * * * notifies" Congress and the public of his intention to enter an agreement 90 days before doing so. 19 U.S.C. 2903(a)(1). After entering into the agreement, "the President submits a * * * final legal text of the agreement," and "(i) a draft of an implementing bill, (ii) a statement of any administrative action proposed to implement the trade agreement, and (iii) the supporting information described in [19 U.S.C. 2903(a)(2)]." 19 U.S.C. 2903(a)(1)(B). The supporting information must include, among other materials, a statement of how the implementing bill will change existing law, and of how the agreement meets the objectives of the Trade Acts. 19 U.S.C. 2903(a)(2).[1]

If the President decides to present a trade agreement in accordance with the fast-track rules, those rules provide for expedited consideration of the implementing legislation as a whole. The leadership in each House is to introduce the President's implementing bill on the day that he submits it. 19 U.S.C.

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[1] Fast track procedures are not statutory, but have been adopted "as an exercise of the rulemaking power of the House of Representatives and the Senate," 19 U.S.C. 2191(a)(1), "with full recognition of the constitutional right of either House to change the rules * * * at any time." 19 U.S.C. 2191(a)(2).

2191(c)(1). House and Senate committee and floor consideration, and votes by each chamber, must occur no more than 90 legislative days after submission. 19 U.S.C. 2191. No amendments to the implementing legislation are permitted, 19 U.S.C. 2191(d), and debate in each chamber is limited to 20 hours. Further restrictions ensure that the process is not undermined by dilatory motions. 19 U.S.C. 2192(d) and (e). NAFTA was negotiated, concluded, and considered by Congress under the terms of the fast-track process.

3. In 1991, petitioners filed an initial challenge to NAFTA in the United States District Court for the District of Columbia, raising the same claims at issue in this case. Pet. App. 4a. Petitioners named both the President and USTR as defendants in that case, and they initially sought an injunction directed against both defendants. Petitioners sought that relief on the basis of an alleged failure by the President and USTR to comply with NEPA in negotiations toward a NAFTA and in the Uruguay Round of multilateral trade negotiations pursuant to the General Agreement on Tariffs and Trade (GATT).

The initial case was filed during the pendency of negotiations toward a NAFTA, but before the agreement had been concluded. Petitioners claimed that the defendants' failure to prepare an EIS for the two proposed agreements violated the NEPA requirement that

> to the fullest extent possible * * *, all agencies of the Federal Government shall * * * include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible

> official on—(i) the environmental impact of the proposed action.

42 U.S.C. 4332(2)(C). The district court dismissed the case on the ground that petitioners then lacked standing. *Public Citizen* v. *United States Trade Representative*, 782 F. Supp. 139 (D.D.C. 1992) (*NAFTA I*). The court of appeals affirmed without reaching the issue of standing. *Public Citizen* v. *United States Trade Representative*, 970 F.2d 916 (D.C. Cir. 1992) (*NAFTA II*). The court of appeals held that petitioners could aver jurisdiction only under the APA, and that they had failed to identify any "final agency action" that would permit APA review under 5 U.S.C. 702, 704. 970 F.2d at 918-923. Although the court did not reach the merits, *id.* at 922 n.7, the court specifically noted that it was "impossible to decide with any confidence whether the (hypothetical) [trade] agreement will include measures 'significantly affecting the quality of the environment' in the *way* contemplated by NEPA," and "hard—probably impossible—to say whether any of them will affect plaintiffs (or their members) with enough directness to establish standing." *Id.* at 921 n.6.

4. The case giving rise to this petition was instituted in the district court shortly after President Bush announced agreement on NAFTA, but before he signed the agreement. On June 30, 1993, the district court issued an opinion concluding that the APA allows review of petitioners' NEPA claims, that petitioners have established standing to assert those claims, and that NEPA applies to NAFTA. Pet. App. 12a-32a. The district court ordered that USTR prepare an EIS under NEPA "forthwith." *Id.* at 34a.

5. The court of appeals reversed. Pet. App. 1a-11a. The court observed at the outset that NEPA does not create a private right of action and that, consequently, petitioners "must rest [their] claim for judicial review on the [APA]." Pet. App. 4a. Because the APA provides for judicial review only of "final agency action," the court of appeals stated that the threshold question in the case is "whether [petitioners] ha[ve] identified some agency action that is final upon which to base APA review." *Id.* at 5a.

In addressing that question, the court of appeals relied on *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992), in which this Court rejected an APA challenge to a census report that the Secretary of Commerce had prepared for transmittal to Congress by the President as part of a reapportionment calculation. The court of appeals explained that in determining "whether an agency action is final, '[t]he core question is whether the agency has completed its decisionmaking process, *and* whether the result of that process is one that will directly affect the parties.'" Pet. App. 5a (quoting *Franklin*, 112 S. Ct. at 2773). APA review was unavailable in *Franklin* "because the final action under the reapportionment statute (transmittal of the apportionment to Congress) was that of the President, and the President is not an agency." Pet. App. 5a (citing *Franklin*, 112 S. Ct. at 2773; *Armstrong* v. *Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991)). The court of appeals further observed that, in *Franklin*, "although the Secretary had completed her decisionmaking process, the action that would directly affect the plaintiffs was the President's calculation and transmittal of the appor-

tionment to Congress, not the Secretary's report to the President." Pet. App. 5a.

The court of appeals concluded that "[t]his logic applies with equal force to NAFTA," because the agreement could have "no effect on [petitioners'] members unless and until the President submits it to Congress." Pet. App. 6a. The court of appeals explained:

> Like the reapportionment statute in *Franklin*, the Trade Acts involve the President at the final stage of the process by providing for him to submit to Congress the final legal text of the agreement, a draft of the implementing legislation, and supporting information. 19 U.S.C. § 2903(a)(1)(B). The President is not obligated to submit any agreement to Congress, and until he does there is no final agency action. If and when the agreement is submitted to Congress, it will be the result of action by the President, action clearly not reviewable under the APA.

Ibid.

The court specifically rejected the proposition that NAFTA should be deemed "final" because agreement on a final text had been reached by the parties at the time of the complaint, reasoning that any agency action concerning NAFTA was "just as much a 'moving target' as the census report in *Franklin* because in both cases the President has statutory discretion to exercise supervisory power over the agency's action. It is completely within the President's discretion, for example, to renegotiate portions of NAFTA before submitting it to Congress or to refuse to submit the agreement at all." Pet. App. 6a.

The court also rejected petitioners' contention that the EIS requirement under NEPA is an independent statutory obligation giving rise to APA review of USTR's actions regardless of what action the President takes concerning the agreement. The court reasoned that the Secretary of Commerce's obligation to prepare the census report at issue in *Franklin*, like the asserted obligation of USTR to prepare an EIS, was an "independent statutory obligation," but one that could not affect the parties without subsequent action by the President and so could not give rise to APA review. Pet. App. 7a.

The court of appeals also addressed and rejected petitioners' assertion that adherence to the reasoning of *Franklin* would effectively undermine NEPA's EIS requirement because "often 'some other step must be taken before' otherwise final agency actions will result in environmental harm," and the related assertion that that reasoning would mean the "death knell" for judicial review of claims under NEPA's legislative EIS requirement. Pet. App. 7a. The court of appeals explained that "*Franklin* is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties," and that the Court in *Franklin* explicitly relied on "the importance of the President's role in the 'integrity of the process' at issue." *Ibid.* The President's responsibility for final action under the Trade Acts, the court said, "indicates that Congress deemed the President's involvement essential to the integrity of international trade negotiations." *Id.* at 7a-8a. In cases where "the President's role is not essential to the integrity of the process," the

court suggested, "APA review of otherwise final agency actions may well be available." *Id.* at 8a.

In a concurring opinion, Judge Randolph expressed doubt concerning that last suggestion, because he was "not prepared to say whether in NEPA cases, the act of proposing legislation constitutes final action under § 704 of the APA." Pet. App. 10a. Judge Randolph concluded, however, that this case presents no occasion to reach that question, because "regardless of whether the President's submission of NAFTA to Congress would be final action, there is no 'final' action that can be attributed to an 'agency.'" *Id.* at 11a.

6. Following the court of appeals' decision and petitioners' filing of this petition for certiorari, President Clinton submitted NAFTA and its implementing legislation to Congress according to the terms and procedures set forth in the Trade Acts. H.R. 3450, 103d Cong., 1st Sess. (1993); see 19 U.S.C. 2903. The House of Representatives approved the agreement and its implementing bill on November 17, 1993. 139 Cong. Rec. H10,048 (daily ed. Nov. 17, 1993). The Senate approved the agreement and the bill on November 20, 1993. 139 Cong. Rec. S16,712 (daily ed. Nov. 20, 1993).

The President signed NAFTA's implementing legislation on December 8, 1993. NAFTA and its related agreements have also been approved by Canada and Mexico through their political processes, and the agreement therefore will take effect, according to its terms, on January 1, 1994.

ARGUMENT

Petitioners contend that this Court should grant review in order to resolve a circuit conflict over the application of *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992). The precise question presented in this case is now moot, however, because Congress has approved NAFTA and has enacted legislation to implement the agreement. Accordingly, the preparation of an EIS would not assist petitioners in their stated purpose of informed participation in the legislative debate, nor would it serve any useful purpose. Further review by this Court would do nothing more than provide advice to lower courts about review of NEPA claims arising from hypothetical future trade agreements, agreements that may never affect the petitioners in this case.

Furthermore, review is not warranted in this case because the court of appeals correctly applied settled principles of law articulated by this Court in *Franklin* v. *Massachusetts*. The decision below does not conflict with any other appellate decisions, and is unlikely to be affected by this Court's decision in *Dalton* v. *Specter*, cert. granted, No. 93-289 (Oct. 18, 1993). Finally, the decision of the court of appeals is correct because it avoids serious constitutional questions concerning the separation of powers.

1. Congressional approval of NAFTA and enactment of its implementing legislation has eliminated any controversy between the parties to this case, thereby rendering the case moot.[2] Petitioners sought

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[2] The federal courts have uniformly held that alleged NEPA claims are moot when the challenged action has been completed. See, *e.g.*, *City of Romulus* v. *County of Wayne*, 634

an EIS to inform the participation of their organizations and their members in the administrative and legislative process culminating in the President's transmittal of the agreement and implementing legislation to Congress for a vote. See Pet. 26. That vote has taken place,[3] and it is therefore impossible for the Court to grant "any effectual relief whatever." *Church of Scientology* v. *United States*, 113 S. Ct. 447, 449 (1992). The petition is thus no more than a request for an advisory opinion as to "what the law would be upon a hypothetical state of facts" presented by future trade agreements. *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

Petitioners nonetheless claim (Pet. 11) that this case is not moot because the controversy is "capable of repetition, yet evading review," in that the same issues may arise with respect to future trade agreements. There currently are no completed trade agreements that are candidates for congressional approval pursuant to the "fast-track" procedures, however, and it is speculative whether such agreements will emerge in the future and whether the

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F.2d 347, 348-349 (6th Cir. 1980); *Florida Wildlife Federation* v. *Goldschmidt*, 611 F.2d 547, 549 (5th Cir. 1980); *Friends of the Earth, Inc.* v. *Bergland*, 576 F.2d 1377 (9th Cir. 1978). That conclusion follows from the fact that NEPA's obligations are pre-decisional, and are intended to ensure "a fully informed and well-considered decision" before an agency takes action. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 558 (1978).

[3] Of course, if Congress had considered any information provided by the President or USTR about NAFTA to be inadequate, including information about environmental consequences of the agreement, Congress could have rejected the agreement on that basis.

timing of such agreements will preclude full litigation of the issues presented.

Moreover, the doctrine permitting assertion of jurisdiction in the exceptional circumstance in which an issue is "capable of repetition, yet evading review," requires more than a prediction that the conduct complained of may recur; it applies only where "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975); see also *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983). In advance of the completion of a trade agreement, with specific terms and conditions, it is impossible to assess whose interests—environmental or otherwise—would be adversely affected by the implementation of the agreement.[4] The district court so ruled in the first NAFTA case when it dismissed petitioners' claims for lack of standing. See *NAFTA I*, 782 F. Supp. at 142.

Accordingly, in order for petitioners to establish jurisdiction on the basis that the issue presented is "capable of repetition, yet evading review," the Court would have to presume that petitioners' members

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[4] It is possible that the Uruguay Round of multilateral trade negotiations under GATT will yield an agreement in principle—but not a final agreement—by December 15, 1993, the deadline for the President to provide notice of his intention to enter into an agreement that would be subject to the fast-track rules. Even if that eventuality were to occur, however, this case would still be moot, because petitioners cannot demonstrate that any such agreement in principle would lead to the conclusion of a final agreement that would injure them in the same manner that they claim to be injured by NAFTA, nor can petitioners show that the issues in any future challenge to such an agreement would be the same as those in this case.

would be among those injured by the implementation of a future trade agreement, and that they would be injured in the same manner asserted here. Such a presumption is untenable, because the evidence upon which petitioners relied to establish standing in this case focused on two types of harms that are specific to NAFTA: harms to members along the United States-Mexico border from increased development, and harms to members from possible displacement of United States environmental health and safety laws that may result if specific terms of NAFTA are construed to conflict with those laws. Pet. App. 23a-28a. There is no certainty that such harms will threaten petitioners' members under another trade agreement, nor any basis on which to conclude now that those predicted future harms will give rise to standing. Thus, petitioners cannot satisfy the requirement that they "make a reasonable showing that [they] will again be subjected to the alleged illegality." *City of Los Angeles* v. *Lyons*, 461 U.S. at 109. Accordingly, this case is moot, and the petition should be denied on that ground.[5]

2. Petitioners have failed to identify any actual conflict between the decision of the court of appeals in this case and that of any other court of appeals.

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[5] For the reasons that follow, this case is not one that would warrant review on its merits. Accordingly, in our view, the procedure applicable to cases that become moot while pending on appeal or in this Court (see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)) is inapplicable, and certiorari should simply be denied. See 77-900 U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978); see also U.S. Br. as Amicus Curiae at 18 n.19, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, No. 92-1123 (Nov. 30, 1993).

Accordingly, review of the decision below would not be warranted even if a live controversy were presented in this case.

a. Petitioners suggest (Pet. 20-25) that this Court should grant review because the lower federal courts are interpreting and applying this Court's decision in *Franklin* in an inconsistent manner. The only circuit conflict they point to, however, is that between the First Circuit in *Cohen* v. *Rice*, 992 F.2d 376 (1993), and the Third Circuit in *Specter* v. *Garrett*, 995 F.2d 404 (1993), over the question whether the APA authorizes judicial review of base closure recommendations of the Secretary of Defense and the Defense Base Closure and Realignment Commission. This Court has already granted a writ of certiorari in *Dalton* v. *Specter*, No. 93-289 (Oct. 18, 1993), to resolve the conflict between *Cohen* and *Specter*, but that conflict is not relevant to the decision of the court of appeals in this case.

In *Cohen*, the First Circuit applied the reasoning of *Franklin* to the Defense Base Closure and Realignment Act of 1990 and concluded that, as in *Franklin*, the President's role in transmitting base closure recommendations and in otherwise taking final action under the Act places those recommendations outside the scope of APA review. 992 F.2d at 381-382. In *Specter*, on the other hand, the Third Circuit concluded that, notwithstanding *Franklin*, there is a "constitutional aspect" to the claims in that case, and that "extra-APA review" was therefore required in order to ensure that the President met what the court deemed to be a constitutional requirement "to remain within the scope of his legal authority." 995 F.2d at 409. The Third Circuit held that the reason-

ing of *Franklin* supported its result, because *Franklin* permitted constitutional (as distinct from APA) review of claims rising from the census report there at issue. *Id.* at 408-409. The United States sought review in *Specter*, because the Third Circuit's reasoning cannot be reconciled with the holding in *Franklin* or with principles of sovereign immunity, and because the Base Closure Act demonstrates congressional intent to preclude review of the particular claims asserted in that case.

Petitioners' reliance on *Specter* is thus entirely misplaced. Petitioners never raised, and the courts below never considered, any argument that the NEPA claims presented in this case had a constitutional dimension that might support review on some basis other than that provided by the APA. This Court will generally not consider arguments that were not pressed or passed upon in the courts below (see, *e.g.*, *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)), and that practice is particularly appropriate where, as here, the underlying controversy is moot.

The other question presented in *Specter*—whether the Base Closure Act precludes judicial review for purposes of the APA—is also of no relevance to this case. The Court's resolution of that issue will have no impact on the correctness of the court of appeals' ruling below that petitioners have failed to identify any final agency action subject to APA review. Accordingly, there is no reason either to grant the petition in this case or to hold it pending disposition of *Specter*, because the questions presented in that

case were either waived by petitioners or are of no possible relevance here.

b. Petitioners also err in contending (Pet. 12-16) that the application of *Franklin* by the court of appeals "conflicts with two decades of judicial review under NEPA." Pet. 12. According to petitioners, courts have exercised review in numerous NEPA cases, including numerous cases involving agency proposals for legislation, "regardless of whether the underlying action involves presidential authority." *Ibid.*

Petitioners' claim of conflict disregards the narrow scope of the decision below. The court of appeals expressly stated that "*Franklin* is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties," Pet. App. 7a, and the court noted that APA review "may well be available" in cases where "the President's role is not essential to the integrity of the process." *Id.* at 8a. Thus, the court's reasoning does not imply, and indeed disavows, petitioners' suggestion that the decision below precludes APA review wherever "final agency action" may implicate presidential authority.

Petitioners' recital (Pet. 13-16 & n.3) of numerous cases in which courts undertook judicial review of NEPA compliance, and in which neither the scope of the APA nor action by the President was placed in dispute, therefore does not demonstrate the existence of a circuit conflict or support the assertion that the decision below threatens the scope of judicial review of NEPA claims on all matters in the executive Branch on which the President may possess ultimate

authority. In the first place, nearly all of the cited cases antedate *Franklin*. Thus, those cases obviously cannot serve to demonstrate the existence of a circuit conflict over the proper application of the principles of APA review announced in *Franklin*.

Moreover, many of the cases on which petitioners rely were decided without reference to the APA, on the erroneous assumption that NEPA created an implied right of action independent of the APA. See, *e.g.*, *Izaak Walton League of America* v. *Marsh*, 655 F.2d 346, 352 (D.C. Cir. 1981). That assumption obviated the need to address whether review of the NEPA claims at issue rested on a final agency action within the meaning of the APA. Petitioners do not claim that NEPA contains a private right of action, however (cf. *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 882-883 (1990)), and instead seek judicial review under the APA. Accordingly, those cases are inapposite.

Furthermore, petitioners' argument that the decision below conflicts with NEPA cases involving presidential authority cannot withstand scrutiny. None of the court of appeals cases cited in the petition involves the issue addressed by *Franklin*: the relationship between the judicial review provisions of the APA and special statutory schemes under which the final decisionmaking authority for the Executive Branch rests with the President personally.

Of the cases cited by petitioners, only those concerning decisionmaking under the Wilderness Act of 1964, 16 U.S.C. 1131-1136, involved a statutory scheme similar to that at issue in this case. Under that Act, the cabinet Secretary with jurisdiction over the federal lands involved recommends to the President

whether a specific area should be designated a wilderness area by Congress. The President is empowered to accept or reject such recommendations and transmit such recommendations as he sees fit to Congress for legislative action.

Cases involving judicial review of NEPA claims under the Wilderness Act have not presented the issue addressed in *Franklin* and in this case of the propriety of APA review where only the President may take final action. *California* v. *Bergland*, 483 F. Supp. 465 (E.D. Cal. 1980), modified, *California* v. *Block*, 690 F. 2d 753 (9th Cir. 1982), involved a decision by the Secretary of Agriculture that not only determined which areas the President should recommend for inclusion in the wilderness system, but that also determined that the areas not designated could be developed for non-wilderness use without further evaluation. The court of appeals characterized the latter aspect of the agency's action as a crucial decision for future management of those lands, and reviewed the asserted NEPA claims on that basis. See 690 F.2d at 762. In other words, the court was *not* undertaking review of NEPA claims arising from the agency's recommendations to the President concerning wilderness designation, but rather those arising from the agency's decision to permit development in the other lands. *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508 (9th Cir. 1992), was a similar case limited to Forest Service decision-making in a single National Forest, in which the President's exercise of discretion likewise was not addressed. Thus, petitioners have failed to point to any appellate case that actually decides the question

presented in this case in a manner different from the result reached by the court below.[6]

c. Petitioners seek to bolster their claim of a conflict by reference to purportedly analogous statutes, including the Freedom of Information Act (FOIA), 5 U.S.C. 552b, and the Federal Advisory Committee Act (FACA), 5 U.S.C. App., at 1175-1180, §§ 1-12. Unlike NEPA, however, those statutes impose obligations—the former to release agency records and the latter to follow specific procedural requirements in the use of advisory committees—that arise regardless of whether agency action, or a final agency action, occurs at all. As petitioners concede, moreover, FOIA has an independent provision for judicial review that is more expansive than the APA. Pet. 24 n.5; see 5 U.S.C. 552(a)(4)(B). Accordingly, neither those statutes nor the hypothetical examples offered by petitioners (Pet. 24) establish a basis for review of the decision in this case.

3. Review is also unwarranted in this case because the judgment below is correct. The court of appeals properly concluded that the principles announced in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992),

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[6] Petitioners do identify an apparent conflict between the decision below and one district court's ruling, in a case arising under the Wilderness Act, that the failure to prepare an EIS, without more, may constitute a "final agency action" supporting APA review of NEPA claims. *Colorado Environmental Coalition* v. *Lujan*, 803 F. Supp. 364 (D. Colo. 1992). That ruling was made in an interlocutory decision that has not yet been subject to appellate review, and the case has not yet resulted in a final judgment. Accordingly, a genuine conflict on this issue may never arise at the appellate level, and review of the issue in this case would be premature.

concerning the scope of APA review preclude the exercise of review here.

a. Petitioners do not dispute that judicial review of the NEPA claims presented in this case is available only under the APA's provision for review of "final agency action." 5 U.S.C. 704. Indeed, petitioners identified no other basis for review before the district court and the court of appeals. The APA requires both that the challenged action be final (*ibid.*) and that the final action be taken by an "agency," not the President. *Armstrong* v. *Bush*, 924 F.2d 282, 288-289 (D.C. Cir. 1991).

In *Franklin*, this Court unequivocally held that the APA's finality requirement bars APA review where, as with NAFTA, the President is charged with taking final action. *Franklin* v. *Massachusetts*, 112 S. Ct. at 2773-2776. The court of appeals recognized that the Trade Acts, like the statute at issue in *Franklin*, "involve the President at the final stage of the process," Pet. App. 6a, and explicitly provide that only the President may take action that can be deemed "final" with respect to trade agreements such as NAFTA.

The President must provide the statutory notification of his intention to enter a free trade agreement, 19 U.S.C. 2903(a)(1); the President must sign the agreement; and the President must submit the final agreement, implementing legislation, and supporting information to Congress, 19 U.S.C. 2903(a)(1)(B). As the court of appeals pointed out, "[t]he President is not obligated to submit any agreement to Congress, and until he does there is no final action. If and when the agreement is submitted to Congress, it will be the

result of action by the President, action clearly not reviewable under the APA." Pet. App. 6a.

Significantly, petitioners do not contend that the court of appeals erred in concluding that, as in *Franklin*, NAFTA presents a case in which "the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties." Pet. App. 7a. Nor do petitioners take issue with the court's conclusion that "Congress deemed the President's involvement essential to the integrity of international trade negotiations." *Id.* at 7a-8a; see *Franklin*, 112 S. Ct. at 2775 (President's role is "important to the integrity of the process" and thus beyond APA's scope). Accordingly, petitioners' claim that the court misapplied *Franklin* must be rejected.

b. The correctness of the judgment below is reinforced by two principles of construction that compel the result reached by the court of appeals. The first is the "cardinal principle" that where a proposed interpretation of a statute would raise "serious doubt" about the statute's constitutionality, courts should "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 465-466 (1989). Judicial "reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government." *Id.* at 466. The second principle of construction that supports the judgment below is the corollary requirement that "[w]hen Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its

intent clear." *Armstrong*, 924 F.2d at 289; see *Franklin*, 112 S. Ct. at 2775.

Applying those principles, *Franklin* made clear that any construction of the APA permitting review where the final action may be taken only by the President would directly threaten the constitutional separation of powers. *Franklin*, 112 S. Ct. at 2775 (refusing APA review "[o]ut of respect for the separation of powers and the unique constitutional position of the President"); *Armstrong*, 924 F.2d at 289 (emphasizing that review might "significantly alter the balance between Congress and the President"). While the court of appeals here expressly declined to address the government's "weighty" constitutional arguments (Pet. App. 8a), the APA review sought by the petitioners implicates the separation of powers because such review contemplates judicial interference with important Article II powers that were not at issue in *Franklin* or *Armstrong*: exercise by the President of his express authority to submit to Congress whatever legislation he sees fit (see U.S. Const. Art. II, § 3, Cl. 2), and of his far-reaching power over the Nation's foreign affairs.[7]

Any judicial imposition of an EIS requirement on the drafting and preparation of NAFTA and similar trade agreements would directly impinge on the

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[7] That power derives from the several constitutional provisions that vest the President with executive and foreign affairs powers, including the "Power, by and with the Advice and Consent of the Senate, to make Treaties." U.S. Const. Art. II, § 2, Cl. 2. See also U.S. Const. Art. II, § 1, Cl. 1 ("The executive Power shall be vested in a President."); Art. II, § 2, Cl. 1 ("The President shall be Commander in Chief."); Art. II, § 3 ("he shall receive Ambassadors and other public Ministers").

President's ability to exercise control over the content and timing of his submissions to Congress. The Constitution expressly grants the President the power to "from time to time * * * recommend to [Congress's] Consideration such Measures *as he shall judge* necessary and expedient." U.S. Const. Art. II, § 3, Cl. 2 (emphasis added). That textual grant of authority to the President plainly confers power to transmit legislation to Congress as the President in his sole discretion deems appropriate, and cannot be constricted by judicially enforced requirements.

Moreover, NAFTA and its related agreements were the subject of sensitive international negotiations and significant foreign policy commitments by the President during the pendency of the action below. The court of appeals' construction of the APA in this case thus gave proper weight to this Court's repeated admonition "that matters relating 'to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952)); see also *Regan* v. *Wald*, 468 U.S. 222, 242 (1984); *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). The court of appeals' decision properly defined the scope of review so as to avoid conflict between APA review and the President's authority to negotiate and conclude trade and other international agreements, which lies at the core of the President's power over foreign relations. See *Curtiss-Wright*, 299 U.S. at 319 ("the President alone has the power to speak or listen as a representative of the nation").

The court of appeals' decision thus adheres to this Court's teaching that federal courts should strive to avoid intrusion on such core Article II powers, even where the intrusion consists of procedural requirements imposed in the first instance on an agency. See *Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989) (construing FACA narrowly to avoid constitutional issue presented by applying the statute to the Department of Justice's practices in advising the President on judicial nominations). Thus, the significant constitutional issues that would be raised by review of petitioners' NEPA claims belie any suggestion that the court of appeals erred in not adopting petitioners' broader reading of the APA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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